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# Recognizing the Need for Mental Health Reform in the Texas Department of Criminal Justice

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## COMMENT

### RECOGNIZING THE NEED FOR MENTAL HEALTH REFORM IN THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE

KARA MCHORSE\*

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## I. INTRODUCTION

When mental health care and the criminal justice system collide, the consequences of such collisions can be unpredictable.<sup>1</sup> When a mentally ill person commits a criminal offense, “gatekeepers of the legal system” typically decide whether the individual would be more appropriately kept within the criminal justice system or instead be given support through a medical facility.<sup>2</sup> These decisions often do not include a clinical evaluation.<sup>3</sup>

Mentally ill criminal offenders make up a concerning high proportion of the population currently housed in state and local correctional facilities.<sup>4</sup> Instead of receiving necessary psychiatric care, many individuals with mental illness end up homeless or in prison—a funnel that ultimately leads to correctional facilities holding the majority of mental health care responsibilities.<sup>5</sup> However, the issue of mental health in the criminal justice system is certainly not a new one. In 2004, then

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1. See Christine Montross, *Hard Time or Hospital Treatment? Mental Illness and the Criminal Justice System*, NEW ENGLAND J. MEDICINE (Oct. 13, 2016), <https://www.nejm.org/doi/full/10.1056/NEJMp1606083> [perma.cc/SP6Z-84CD] (describing the collision of psychiatric patients and the criminal justice system as “unpredictable and rang[ing] from stability and safety to unmitigated disaster.”).

2. *Id.*

3. See *id.* (explaining the decision-making performed by law enforcement and legal personnel such as “police officers, prosecutors, and judges.”). The population size of mentally ill in correctional facilities rose during the 1970s and 1980s because of the wave of state hospital closures. *Id.*

4. See John P. Docherty, *Creating New Hope for Mental Illness and the Criminal Justice System*, NAT’L ALLIANCE ON MENTAL ILLNESS (Oct. 20, 2017), <https://www.nami.org/Blogs/NAMI-Blog/October-2017/Creating-New-Hope-for-Mental-Illness-and-the-Crimi> [http://perma.cc/LPQ4-X29U] (“In 44 out of 50 states, prisons and jails hold more individuals with serious mental illness than the largest state hospital.”).

5. See Samantha Raphelson, *How the Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis*, NPR (Nov. 30, 2017, 1:15 PM), <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis> [perma.cc/AC6F-9XW4] (analyzing how the wave of psychiatric hospital closures in the 1950s and 1960s led to the current mental health crisis in the United States).

Lieutenant Governor Greg Abbott spoke about the changes that need to be made in the Texas criminal justice system, saying, “[o]ur current laws governing how we deal with the criminally insane have failed.”<sup>6</sup> The traditional criminal justice model in Texas is defined by historically inadequate management of mentally ill defendants.<sup>7</sup> No one should be deprived of equal justice because of a mental illness, and Texas jails and prisons should not be utilized as substitutes for mental health treatment centers.<sup>8</sup>

## II. MENTAL HEALTH CARE IN TEXAS

Texas Health and Human Services encourages people to “shake the stigma” that often prevents people from seeking help.<sup>9</sup> Services like family-based support programs, family violence programs, mental health first aid training, prevention and early intervention, and substance abuse services provide families and individuals experiencing mental or behavioral issues an opportunity to seek support.<sup>10</sup> The mental health care movement incorporates a number of agencies and partnerships whose primary goal is to improve access to and spread awareness of mental health care, treatment, and support.<sup>11</sup> Nevertheless, the public health crisis continues as the

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6. Phil Magers, *Analysis: Texas Reviews Insanity Defense*, UPI (May 7, 2004, 5:19 PM) [https://www.upi.com/Analysis-Texas-reviews-insanity-defense/22801083964762/\[http://perma.cc/GGP2-L3RZ\]](https://www.upi.com/Analysis-Texas-reviews-insanity-defense/22801083964762/[http://perma.cc/GGP2-L3RZ]). Governor Abbott continued: “They have failed because they do not give prosecutors and mental-health professionals the tools they need to keep the dangerously insane off the streets. The cost of this failure has been high.” *Id.*

7. See Harriet O’Neill, *Texas Courts Step Up on Mental Health*, FORT WORTH STAR-TELEGRAM (May 15, 2018, 8:04 PM), <https://www.star-telegram.com/opinion/article211186029.html> [http://perma.cc/AZ7N-NVRN] (“[O]ur traditional model of crime and punishment has been poorly equipped to handle defendants with mental health issues.”).

8. See *id.* (“Those who come into the court system suffering from unmet needs deserve jurists trained to identify and address the problem.”).

9. See *Mental Health and Substance Use*, TEX. HEALTH & HUM. SERV., <https://hhs.texas.gov/services/mental-health-substance-use> [perma.cc/2W9H-RU3E] (advertising mental health services and where to find help).

10. *Mental Health and Substance Use Resources*, TEX. HEALTH & HUM. SERV., <https://hhs.texas.gov/services/mental-health-substance-use/mental-health-substance-use-resources> [http://perma.cc/66MH-FAAV] [hereinafter *Resources*].

11. The Suicide Prevention Resource Center provides training and materials for suicide prevention professionals. *Id.* The Law Enforcement Crisis Intervention in Texas works to specially train police on intervention protocols when encountering people experiencing a crisis. *Id.* Mental Health America—Texas “[h]elps people recover from mental illnesses and addictions through innovative education, advocacy and services.” *Id.* Ask About Suicide to Save a Life provides “prevention training on identifying warning signs and appropriate referral strategies.” *Id.* A number

increase in the number of people experiencing mental health problems increases with the shortage of inpatient care. In 2017, Texas's mental health care system was scrutinized under a new light. In what Governor Abbott called the largest attack of its kind in Texas's history, the gunman in the Sutherland Springs church shooting had escaped from a psychiatric hospital just five years before the shooting.<sup>12</sup> Mental health is certainly not a topic to be brushed aside any longer.

#### A. *Rates of Mental Illnesses*

As of 2017, approximately one million Texas adults suffer from serious mental illnesses.<sup>13</sup> Mental illness extends beyond adults—roughly half a million children in Texas “suffer from a severe emotional disturbance.”<sup>14</sup> Throughout the United States, an estimated “3.4[%] of Americans—more than 8 million people—suffer from serious psychological problems.”<sup>15</sup> The age groups most likely to be affected by mental health issues have also shifted over the years, with middle-aged adults now among those considered “high-risk for mental illness and suicide.”<sup>16</sup> Symptoms are also now most prevalent in people with lower incomes and less education.<sup>17</sup> By the end of this year alone, one out of every five Texas adults will experience a mental health issue.<sup>18</sup> Additionally, seventy-five percent of registered Texas voters

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of similar partnerships are in place to help people with mental health conditions and substance abuse problems. *See also id.* (describing other programs and partnerships for mental health resources).

12. *See* Jennifer Calfas & Mahita Gajanan, *What to Know About the South Texas Church Shooting*, TIME (Nov. 6, 2017, 7:27 PM), <http://time.com/5010772/texas-sutherland-springs-church-shooting/> [<http://perma.cc/V3PC-6RUN>] (“At least [twenty-six] people were killed and [twenty] others injured Sunday when a gunman opened fire at a church in a small town southeast of San Antonio in what has become one of the largest mass shootings in modern U.S. history.”); Raphelson, *supra* note 5.

13. Jan Ross Piedad, *1 Million Texas Adults Suffer from Serious Mental Illness*, TEX. PUB. RADIO (Apr. 9, 2017), <http://www.tpr.org/post/1-million-texas-adults-suffer-serious-mental-illness> [<http://perma.cc/6NXX-2MXN>] (“[A]pproximately one million adults are affected by a serious mental illness—from depression and post-traumatic stress disorder to schizophrenia, bipolar disorder and more—and half a million children under age 17 suffer from a severe emotional disturbance.”).

14. *See id.* (discussing the mental health statistics in Texas).

15. Raphelson, *supra* note 5.

16. Amanda MacMillan, *Mental Illness Is on the Rise in the U.S. for a Frustrating Reason*, HEALTH (Apr. 18, 2017), <https://www.health.com/depression/8-million-americans-psychological-distress> [<http://perma.cc/P9T9-2BYB>]. Adults ages forty-five to sixty-four (particularly middle-aged women), as opposed to young adults, are most likely to have symptoms of severe psychological distress. *Id.*

17. *Id.*

18. Tex. Health and Human Serv., *Mental Health in Texas*, MENTAL HEALTH TEX., <https://mentalhealthtx.org> [<http://perma.cc/R233-2PXX>].

will personally encounter mental health concerns through the experiences of close friends or family members.<sup>19</sup> The rate of mental illness continues to increase, with people experiencing mental and emotional distress at unprecedented levels.<sup>20</sup>

#### B. *Mental Health Resources*

The state of Texas seeks to provide mental health support through a myriad of resources. “Texas Health and Human Services contracts with [thirty-seven] local mental health authorities and two local behavioral health authorities to deliver mental health services in communities across Texas.”<sup>21</sup> Among these services are counseling, medication training and support, and psychosocial rehabilitation.<sup>22</sup> Texas Health and Human Services is also responsible for ten state hospitals that provide mental health care.<sup>23</sup> Each hospital serves a designated group of people depending on the necessary care, including children, adults, and people interacting with the Texas Department of Criminal Justice.<sup>24</sup> State hospital admission involves both voluntary and court-ordered commitment, and treatment ranges from psychiatric services to forensic competency restoration services.<sup>25</sup>

Ultimately, state hospitals and mental health programs are only as effective as their availability, and with the increase in deteriorating mental health, mental health providers cannot keep up.<sup>26</sup> The trend toward the “deinstitutionalization of psychiatric patients in the 1950s and 1960s”<sup>27</sup> ignited the downfall in numbers of long-term care facilities and psychiatric beds, which has resulted in an unprecedented lack of space and availability

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19. O'Neill, *supra* note 7.

20. See MacMillan, *supra* note 16 (“A new study reveals 8 million Americans have serious psychological distress, and many don’t have health insurance or access to effective treatment.”).

21. *Adult Mental Health*, TEX. HEALTH & HUM. SERV., <https://hhs.texas.gov/services/mental-health-substance-use/adult-mental-health> [http://perma.cc/49CM-FVNS].

22. See *id.* (“HHS provides programs and services based on evidence-based practices to help people manage mental illness.”).

23. See *State Hospitals*, TEX. HEALTH & HUM. SERV., <https://hhs.texas.gov/services/mental-health-substance-use/state-hospitals> [http://perma.cc/55C5-T2P7] (providing information on state hospital admissions).

24. *Id.*

25. See *id.* (“All patients sent to the facility through court commitments are evaluated for admission. In general, to be involuntarily admitted, you must show symptoms of mental illness and that you are a danger to yourself or others.”).

26. There is a lack of experienced, licensed physicians and therapists available to help people with mental illness. MacMillan, *supra* note 16.

27. Raphelson, *supra* note 5.

for mental health treatment.<sup>28</sup> In 2012, the Treatment Advocacy Center reported that, over the span of just five years, the number of available psychiatric beds in the United States fell by approximately fourteen percent.<sup>29</sup> The lack of available treatment translates to a growing population of untreated mental health patients.<sup>30</sup>

Texas residents may have needs-based access to mental health services, regardless of income.<sup>31</sup> In 2017, Texas expended nearly “\$1.4 billion in emergency room costs and \$650 million in local justice system costs” in order to get ahead of mental illness concerns.<sup>32</sup> Nevertheless, even with these financial measures in place, many people experiencing mental health problems do not have health insurance or access to treatment.<sup>33</sup> A health survey conducted by the Centers for Disease Control and Prevention (CDC) found “that 9.5% of distressed Americans in 2014 did not have [the necessary] health insurance” to receive psychiatric help, which may explain why the U.S. suicide rate has risen to 43,000 people per year.<sup>34</sup>

Furthermore, President Trump’s Fiscal Year 2019 budget will substantially affect the resources available to Americans with mental health illnesses and substance abuse disorders.<sup>35</sup> Although the “budget requests \$68.4 billion for the Department of Health and Human Services (HHS),” which is a twenty-one percent decrease (\$17.9 billion) from 2017,<sup>36</sup> funding

28. After the deinstitutionalization effort, elected officials were responsible for providing the necessary “funding, support, and direction for the community mental health systems that were supposed to replace the mental health hospitals shut down as part of the ‘deinstitutionalization’ effort that began in the 1960s,” yet they have failed to do so. HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 5 (2003).

29. In 2012, “there were 50,509 state psychiatric beds, meaning there were only fourteen available beds per 100,000 people.” Raphelson, *supra* note 5.

30. *Id.* (“A severe shortage of inpatient care for people with mental illness is amounting to a public health crisis, as the number of individuals struggling with a range of psychiatric problems continues to rise.”).

31. *See Resources*, *supra* note 10 (listing resources available to those “who may experience mental health or behavioral health issues.”).

32. Piedad, *supra* note 13.

33. While the 2010 Affordable Care Act helped improve access to health care for patients with diabetes and cancer, “people with mental illness [began] falling behind.” MacMillan, *supra* note 16.

34. *Id.*

35. *See* Caren Howard, *How Trump’s Budget Will Affect People with Mental Health Conditions*, MENTAL HEALTH AM. (Feb. 25, 2018), <http://www.mentalhealthamerica.net/blog/how-trumps-budget-will-affect-people-mental-health-conditions> [<https://perma.cc/Z4H9-JTLB>] (“We combed through the budget and found several key provisions that could affect people with mental health and substance use disorders.”).

36. *Id.*

for the Substance Abuse and Mental Health Service Administration's Mental Health and Substance Abuse Treatment Programs will be reduced by \$600 million, and the budget will discontinue funding for the Screening, Brief Intervention, and Referral to Treatment program.<sup>37</sup> Additionally, the budget will reduce Medicare by \$1.4 trillion and Medicaid by approximately \$500 billion, both of which are the country's highest-paying contributors to behavioral health services.<sup>38</sup> While there are some positive aspects of the budget plan,<sup>39</sup> its adverse effects on mental health treatment are distressing in an area necessitating reform.<sup>40</sup>

### III. MENTAL ILLNESS AND THE TDCJ

The Texas Department of Criminal Justice advertises its mission "to provide public safety, promote positive change in offender behavior, reintegrate offenders into society, and assist victims of crime."<sup>41</sup> In recent years, Texas law enforcement and the criminal justice system have increasingly come into contact with people suffering from severe mental illnesses.<sup>42</sup> There are approximately 146,000 offenders currently housed in the Texas Department of Criminal Justice.<sup>43</sup> Of these offenders, "about 25,000 (17%) have a medical alert code indicating a current mental health disorder or history of a mental disorder."<sup>44</sup> The criminal justice system has

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37. *Id.*

38. *Id.*

39. The budget provides "\$10 billion over a period of five years to combat the opioid epidemic and serious mental illness." An additional \$15 million will be provided to implement a new Assertive Community Treatment, which supports and aids individuals suffering from serious mental illnesses. The Fiscal Year 2019 budget also gives \$500 million to the National Institutes of Health in order to "support and supplement existing efforts with a . . . research initiative on opioid abuse." *See id.* (detailing the Fiscal Year 2019 budget and its effect on people with mental health and substance abuse conditions).

40. *See id.* (finding critical changes in the President's budget).

41. TEX. DEP'T OF CRIM. JUST., HANDBOOK FOR VOLUNTEERS 4 (2018).

42. Frank M. Webb, *Criminal Justice and the Mentally Ill: Strange Bedfellows*, 49 TEX. TECH L. REV. 817, 818 (2017).

43. *Mental Health Program and Services*, TEX. DEP'T CRIM. JUST. 2, [http://tdcj.state.tx.us/divisions/cmhc/docs/CMHC\\_MH\\_Overview.pdf](http://tdcj.state.tx.us/divisions/cmhc/docs/CMHC_MH_Overview.pdf) [<http://perma.cc/2WSK-QFY9>] [hereinafter *Program and Services*].

44. *Id.* Daily, health care staff for the Texas Department of Corrections care for "1,514 inpatient psychiatric patients, 450 patients enrolled in the Program for the Aggressive Mentally-ill Offender, 725 patients in the Mentally Retarded Offender Program, and approximately 15,300 mental health outpatients." *Id.*



become the “de facto” mental health asylum of our time.<sup>45</sup>

#### A. *The Texas Criminal Justice Process*

The process of a criminal trial, from the date of the offense to sentencing, is described in the Texas Code of Criminal Procedure.<sup>46</sup> Law enforcement begins the investigation process when responding to a crime scene soon after the commission of a crime.<sup>47</sup> Once a determination has been made as to the identification of the offender, officers may make an arrest.<sup>48</sup> The grand jury is then called to the discharge of their duties, at which time the prosecutor for the state of Texas may choose to go before the grand jury and present to them the felony offenses liable to indictment.<sup>49</sup> The grand jury must then determine if there is “sufficient evidence to require the accused to stand trial for a criminal offense[.]” in which case at least seventy-five percent of the grand jurors must accept the evidence sufficient to issue an indictment, or “true bill.”<sup>50</sup> Once an offender is indicted, they are given the opportunity to participate in a number of pretrial procedures, including hearings, motions, plea bargaining, and motions in limine, before progressing to a criminal trial.<sup>51</sup> The United States Constitution provides specific trial requirements to preserve the constitutional rights of the

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45. See Webb, *supra* note 42, at 818 (discussing the ramifications of the oftentimes dysfunctional relationship between criminal justice and mental health).

46. See generally TEX. CODE CRIM. PROC. ANN. (providing the Texas statutes and court rules for criminal proceedings in Texas).

47. STATE BAR OF TEX. CRIM. JUST. SEC., THE TEX. CRIM. JUST. PROCESS: A CITIZEN'S GUIDE 3–4 (Jan. 1, 1996, Rev. 2005) [hereinafter CITIZEN'S GUIDE]. The officer will typically meet with any victims, question witnesses, collect evidence, and detain potential suspects. See *id.* (providing a better understanding of the Texas criminal justice process).

48. See CRIM. PROC. art. 14.01 (describing the Texas procedure for arresting criminal offenders both with and without an arrest warrant); *Id.* art. 15.01 (describing a warrant of arrest); see also CITIZEN'S GUIDE, *supra* note 47, at 6 (“[A] peace officer must obtain an arrest warrant before taking a person into custody. But a peace officer may arrest a person without a warrant only if: (1) there is probable cause to believe that the person committed an offense; and (2) the arrest falls within one of the exceptions specified in chapter 14 of the Code of Criminal Procedure.”).

49. CRIM. PROC. art. 20.01. An “indictment” (“bill of indictment”) is a formal written statement by the grand jury for the purpose of accusing the person named of some “act or omission which, by law, is declared to be an offense”; see *id.* art. 21.01 (defining what an indictment is and how it is presented); CITIZEN'S GUIDE, *supra* note 47, at 7–8 (describing how the grand jury is utilized to indict a criminal offender).

50. See CITIZEN'S GUIDE, *supra* note 47, at 7–8 (explaining the grand jury's role in presenting an offender with a criminal trial).

51. See *id.* (detailing the process of pretrial procedures).

accused.<sup>52</sup> These requirements include the right to a speedy trial by jury, the right to be informed of the nature of the accusation against the accused, and the right to be confronted with witnesses.<sup>53</sup>

The criminal trial process in Texas generally consists of two parts: the guilt or innocence phase and the sentencing phase.<sup>54</sup> The guilt or innocence phase is the typical “trial” that most laypeople would refer to, where evidence is presented before a judge or jury in order for said judge or jury to reach a determination of guilt or innocence based on the facts.<sup>55</sup> In the event of a finding of guilt, the trial proceeds to the sentencing phase, which is essentially punishment assessment.<sup>56</sup>

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52. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

53. See *id.* (listing the rights of the accused in a criminal trial).

54. See CRIM. PROC. art. 36.01 (“[a] jury being impaneled in any criminal action . . . the cause shall proceed . . .”). A criminal trial by jury typically proceeds as follows:

- (1) The jury is impaneled following voir dire examination and any challenges for cause or peremptory challenges.
- (2) The information or indictment is read to the jury.
- (3) The defendant enters his/her plea.
- (4) Opening statements may be made by each side.
- (5) The testimony on the part of the state is offered.
- (6) The testimony on the part of the defense is offered.
- (7) Rebutting testimony may be offered by each side.
- (8) The court’s written charge setting forth the law applicable in the case is read to the jury.
- (9) Attorneys for each side argue their case to the jury.
- (10) The jury deliberates. If the jury finds that the state proved beyond a reasonable doubt that the defendant committed the offense charged (or a lesser included offense), the trial proceeds to the punishment phase. A not guilty verdict ends the trial and discharges the defendant. If the jury is unable to agree to a unanimous verdict, a mistrial or “hung jury” occurs and the jury is discharged. The case may be retried at a later date.
- (11) The judge assesses punishment unless the defendant requests the jury to assess punishment or the state seeks the death penalty in a capital felony.

CITIZEN’S GUIDE, *supra* note 47, at 9.

55. See CRIM. PROC. art. 36.01 (detailing how evidence is presented throughout the trial in order for the judge or jury to make a determination); CITIZEN’S GUIDE, *supra* note 47, at 8–9 (“The Texas Constitution guarantees the accused in all criminal prosecutions the right to a trial by jury. The defendant may waive trial by jury and proceed with trial to the court . . .”).

56. If the jury renders a finding of guilt, the trial then proceeds in accordance with Article 37.07. See CRIM. PROC. art. 37.07(b) (“[I]f a finding of guilty is returned, it shall then be the responsibility of

## 1. Sentencing

In the sentencing phase, the judge or jury will take into consideration the facts of the case and the offender's criminal history to determine the sentencing or punishment.<sup>57</sup> Much like the guilt or innocence phase, the sentencing phase must also comport with the constitutional rights as prescribed by the United States Constitution.<sup>58</sup> In determining the sentence to be imposed, courts should consider the need for punishment. For the purposes of public protection and rehabilitation, courts should consider the need to protect the public from the possibility of later crimes committed by the defendant while maintaining the need to provide the defendant with educational training, medical care, or other correctional treatment.<sup>59</sup> In other words, the sentence should be purposeful and meaningful.

## 2. Probation and Supervised Release

"Probation" is commonly known as "community supervision." This court-determined requirement refers to the defendant's conditional release into the community.<sup>60</sup> Courts are required to provide "explicit condition[s] of a sentence of probation," known as mandatory conditions.<sup>61</sup> In addition to the mandatory conditions of probation, courts may also provide discretionary conditions.<sup>62</sup> Probation is sometimes utilized in cases involving a mentally impaired offender, which is an effort to keep the offender out of jail and in the community.<sup>63</sup> While it is intended as a positive alternative to incarceration, probation is not always effective, and

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the judge to assess the punishment applicable to the offense . . . in other cases where the defendant so elects in writing . . . the punishment shall be assessed by the same jury[.]").

57. *See id.* art. 42.02 ("The sentence is that part of the judgment, or order revoking a suspension of the imposition of a sentence, that orders that the punishment be carried into execution in the manner prescribed by law.").

58. *See, e.g.,* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

59. *See* 18 U.S.C. § 3553(a)(2)(C) (2018) (listing factors to be considered in imposing a sentence); *Id.* § 3553(a)(2)(D) (listing the statutory sentencing purposes of public protection and rehabilitation).

60. CITIZEN'S GUIDE, *supra* note 47, at 10.

61. *See* 18 U.S.C. § 3563(a) (listing the mandatory conditions for a sentence of probation).

62. *See id.* § 3563(b)(9) ("The court may provide, as further conditions of a sentence of probation . . . that the defendant . . . undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose[.]").

63. *See id.* (providing possible conditions of probation as determined by the court).

many affected mentally ill offenders find themselves in jail anyway.<sup>64</sup>

For example, in 2015, defendant Zachariah Tyre pled guilty to the second-degree felony offense of burglary of a habitation, at which time he was granted deferred adjudication and sentenced to three years' probation.<sup>65</sup> As part of his probation, Tyre was referred to Pecan Valley Centers for Behavioral and Developmental Healthcare, where his Bipolar I disorder was confirmed.<sup>66</sup> However, before the end of the probationary period, Tyre's close family began contacting the court to express concern over Tyre, saying he may be "spiraling out of control" and that "he had not been taking his medication as prescribed."<sup>67</sup> In December 2017, Tyre was arrested while leaving a bar, and in January 2018, Tyre began sending harassing and threatening messages to his ex-wife, whose house he had initially broken into.<sup>68</sup>

While sitting in his probation revocation hearing, I witnessed the court acknowledge Tyre's mental health problems. Tyre's family, and even his ex-wife, testified that he desperately needed mental health help, pleading for an alternative to incarceration on his behalf. Nonetheless, Texas law on mental health does not provide a chance for offenders like Tyre, and he was sentenced to the Texas Department of Corrections after the judge revoked his probation.<sup>69</sup> Why did probation—a system in place to help people like him—fail Tyre? Was it Tyre's actions, or was his probationary sentence not implemented in a manner to ensure his success? Zachariah Tyre ended up in jail despite probation, where increasingly more mentally ill offenders seem to be finding themselves.<sup>70</sup>

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64. *See generally* Chronological Record of Contacts, State of Texas v. Tyre, No. 1397289 (2015) (on file with author) (indicating the failure of probation with mentally ill offenders).

65. Consultation Setting Plea Offer Acknowledgement, State v. Tyre, No. 1397289 (Tarrant Cty. Crim. Ct. No. 3, Tex. Mar. 17, 2015).

66. Chronological Record of Contacts, *supra* note 64, at 1–2.

67. Chronological Record of Contacts, *supra* note 64, at 44.

68. *Id.* at 9, 57; Petition to Proceed to Adjudication, State v. Tyre, No. 1397289 (Tarrant Cty. Crim. Ct. No. 3, Tex. Feb. 6, 2018).

69. *See generally* TEX. CODE CRIM. PROC. ANN. (providing the law for criminal proceedings in Texas).

70. *See* Webb, *supra* note 42, at 818 (discussing the "ramifications of the oftentimes dysfunctional relationship between criminal justice and mental health").

B. *Diversion Programs*

Diversion programs enforce strategies “seeking to avoid the formal [intake and] processing of an offender by the criminal justice system.”<sup>71</sup> “A typical diversion program results in a person who has been accused of a crime being directed into a treatment or care program as an alternative to criminal prosecution and imprisonment.”<sup>72</sup> Diversion programs are often implemented to help mentally ill offenders receive the services they require to remain in the community and, more importantly, to gain control of their mental health.<sup>73</sup>

Diversion is prevalent throughout the many stages of the criminal justice process.<sup>74</sup> “The most-common diversion decision occurs when a police officer decides not to cite or arrest a [particular] suspect, even when there is considerable evidence that a crime has been committed.”<sup>75</sup> While officers use their discretion in deciding whether to make an arrest or not, the criminal justice system may require the accused to enroll in a social-service diversion program.<sup>76</sup> The circumstances under which an offender is required to await trial can be immensely impactful not only for the offender but also for their families. Jail diversion programs avert the economic and

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71. Harry R. Dammer & Carrie A. Weise-Pengelly, *Diversion: Criminal Justice System*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/diversion> [http://perma.cc/UF6V-MRCT].

There are two types of diversion: informal and formal. Informal diversion occurs when an official in the justice system decides, by using the appropriate discretion, that a case would be better kept out of the justice system. . . . In more formal situations, there is typically a program that the accused must complete as a condition of diversion.

*Id.*

72. *See id.* (“Diversion, any of a variety of programs that implement strategies seeking to avoid the formal processing of an offender by the criminal justice system.”).

73. *See Jail Diversion Services*, TEX. HEALTH & HUM. SERV., <https://hhs.texas.gov/services/mental-health-substance-use/mental-health-crisis-services/jail-diversion-services> [http://perma.cc/7ZBY-QTBM] [hereinafter *Jail Diversion Services*] (“When someone is involved or at risk for involvement in the criminal justice system, or court ordered for treatment, jail diversion and competency restoration programs can help them get the services they need to stay in the community and take care of their health.”).

74. Dammer & Weise-Pengelly, *supra* note 71, (“Diversion occurs at different stages of the system.”).

75. *Id.* Cases in which law enforcement interaction results in diversion are commonly traffic offenses where the officer will only give the offender a warning. *Id.*

76. Forcing an offender into such programs “is done with the belief that personal problems such as substance abuse or uncontrollable anger may cause criminal [behavior] and that treatment of those factors will prevent a reoccurrence of the crime.” *Id.*

social consequences experienced when offenders are instead imprisoned as they await trial.<sup>77</sup> In addition to jail diversion before trial, the opportunity for diversion continues well into the prosecution—even after conviction.<sup>78</sup> “[M]ost felonies [will receive] a term of confinement, but many offenders will not serve a full term of incarceration.”<sup>79</sup> For mentally ill offenders, diversion is often utilized through court-ordered outpatient mental health services.<sup>80</sup> Through “court-ordered outpatient mental health services,” offenders are placed on either “temporary or extended commitment for mental health” treatment.<sup>81</sup> Throughout the State of Texas, mental health diversion programs are designed to assist mentally ill offenders in obtaining mental health treatment without serving jail time.<sup>82</sup>

“For the offender, the main goal of diversion is rehabilitation.”<sup>83</sup> Supporters of diversion programs “hope[] that diversion will allow offenders to establish a normal lifestyle without the burden of a criminal

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77. *Id.* Jail diversion is a discretionary option frequently utilized by an arresting officer.

In the case of a minor offense, a summons can be given, indicating a date and time for the accused to face the charges in court. A summons operates much like a traffic ticket. The accused is technically arrested but is free to go after agreeing to a court date. Because of fears that a summons may underplay the seriousness of a criminal accusation, its use is restricted to only the least-serious misdemeanors. Another jail-diversion approach, release on recognizance (ROR), occurs after the suspect has been taken to the station house and booked. Under ROR, the accused promises to appear in court at a specified date and time in exchange for release from custody.

*Id.*

78. *Id.*

79. *Id.* In these cases, the offender will be considered for probation or community service. *Id.*

80. *Jail Diversion Services*, *supra* note 73.

81. Under Texas Health and Safety Code, Chapter 574, the court system has the authority to order an offender, or “proposed patient,” to “receive court-ordered temporary inpatient mental health services[.]” TEX. HEALTH & SAFETY CODE ANN. § 574.034(a). The court may only do so if a “judge or jury finds, from clear and convincing evidence, that: (1) the [offender] is a person with a mental illness; and (2) as a result of that mental illness the [offender]: . . . is likely to cause serious harm” to himself or others. *Id.* § 574.034(a)(1)–(2)(B). Alternatively, court-ordered mental health treatment may be ordered if the offender is “suffering severe and abnormal mental, emotional, or physical distress . . . and unable to make a rational and informed decision” about their treatment. *Id.* §§ 574.034(a)(2)(C)(i), 574.034(a)(2)(C)(iii).

82. Mental health diversion programs consist of professionals—including nurses, doctors, and counselors—whose goal is to help mentally ill offenders. *Jail Diversion Services*, *supra* note 73 (“Court-ordered outpatient mental health services are provided to people who are court-ordered to undergo outpatient mental health treatment.”).

83. Dammer & Weise-Pengelly, *supra* note 71. “Diversion programs provide offenders with essential services that can address the underlying causes of criminal [behavior], such as alcohol and drug abuse.” *Id.*

record.”<sup>84</sup> Diversion is more cost-efficient than its justice system alternative, and those involved are able to “avoid the expense and harshness of the full operation of the criminal law.”<sup>85</sup> However, diversion is not without its critics. The most obvious criticisms of diversion are those involving society—namely that justice cannot be served through diversion programs because they tend to put the “needs of the offender over those of the victims.”<sup>86</sup> More pressing, however, is the criticism that diversion programs are not successful.<sup>87</sup>

“In 2015, 50% of grievances submitted by incarcerated people to the Texas Commission on Jail Standards (TCJS) involved complaints regarding medical services, including mental health services.”<sup>88</sup> With over half of all incarcerated adults estimated to have at least one mental health condition, increasing access to jail diversion programs is critical.<sup>89</sup> The Texas Health and Safety Code allows counties to prioritize funding for the collaboration of jail diversion programs among law enforcement and judicial systems.<sup>90</sup> However, “only a small fraction of Texans with a mental illness who are eligible for diversion programming actually receive diversion services.”<sup>91</sup>

While “in some cases programs are poorly designed . . . . In other cases the offender fails to abide by the requirements of diversion.”<sup>92</sup> Sometimes, the failure to comply with diversion requirements is not always intentional. For example, in Houston, the number one reason offenders were unable to complete a particular diversion program is the fact that they could not afford

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84. *Id.*

85. *Id.*

86. *Id.* (“The controversies surrounding diversion programs often are presented as though diversion reflects some sort of unusual undercutting of the penal system.”).

87. *Id.* (“Diversion is also criticized because not all programs are successful.”).

88. *Texas Department of Criminal Justice and Local Criminal Justice Agencies*, HOGG FOUND. FOR MENTAL HEALTH (2018), <http://hogg.utexas.edu/mh-guide/public-behavioral-health-services-in-texas/texas-department-of-criminal-justice-and-local-criminal-justice-agencies> [<http://perma.cc/G9NX-ADZN>] [hereinafter *Texas Department of Criminal Justice*].

89. *See id.* (“A significant number of individuals involved in the Texas criminal justice system live with one or more mental health conditions, and many have co-occurring substance use disorders.”).

90. *See* TEX. HEALTH & SAFETY CODE ANN. § 533.108 (granting authority to develop and prioritize funding for “a system to divert members of the priority population”).

91. *Texas Department of Criminal Justice*, *supra* note 88. Diversion programs “var[y] from county to county.” *Id.* While some communities “offer robust diversion opportunities that address multiple intercepts of the sequential intercept model. Other rural and urban areas do not have the resources to implement any type of diversion strategy at all.” *Id.*

92. Dammer & Weise-Pengelly, *supra* note 71.

the costs of required treatment classes.<sup>93</sup> When diversion programs fail, they are most harmful to the offender, whose rehabilitation is the primary goal of such programs.<sup>94</sup>

### C. *Specialty Courts*

Some Texas counties recognize that some individuals, specifically those with serious mental illness or substance abuse conditions, can be better served outside the jail system. Specialty court programs are often utilized by Texas counties to divert these offenders away from incarceration.<sup>95</sup> Specialty courts provide offenders with a way out of the criminal justice cycle by applying intervention, supervision, treatment, and rehabilitation.<sup>96</sup> Each type of specialty court requires judges, attorneys, law enforcement, and mental health professionals to work together to provide alternatives to incarceration.<sup>97</sup> These programs work to address the underlying concerns that lead mentally ill offenders to a cycle of crime.<sup>98</sup> Drug courts, DWI courts, Veterans courts, family courts, and mental health courts are among the most common specialty courts.<sup>99</sup>

Mental health courts developed throughout Texas, providing an alternative for the criminal justice system and a tailored prosecutorial option appropriate for low-level crimes committed by individuals who suffer from mental illness.<sup>100</sup> The Texas Government Code defines the “mental health court program” as the following:

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93. Meagan Flynn, *Not Having \$150 “No. 1 Reason” Nearly 300 Have Failed Marijuana Diversion Program*, HOUS. PRESS (Aug. 1, 2017, 6:00 AM), <https://www.houstonpress.com/news/1600-benefitted-from-oggs-marijuana-diversion-program-but-many-failed-to-complete-it-9656910> [http://perma.cc/URJ8-QH4G] (“[T]he ‘No. 1 one reason’ people have failed to take the class is that they said they just didn’t have the \$150 to pay for it.”).

94. Dammer & Weise-Pengelly, *supra* note 71 (“When diversion programs fail, individuals suffer, tax dollars are wasted, victimization is increased, and the system loses credibility, and in some of these cases diversion can actually be more expensive than normal processing, because offenders later have to be reprocessed and possibly incarcerated.”).

95. *Texas Department of Criminal Justice*, *supra* note 88. In 2016, Texas had 191 specialty courts in operation. *Id.*

96. *Specialty Court Programs*, OFF. TEX. GOVERNOR: GREG ABBOTT, [https://gov.texas.gov/organization/cjd/specialty\\_courts](https://gov.texas.gov/organization/cjd/specialty_courts) [http://perma.cc/752G-TVFE] (“Every offender sent to prison or state jails takes significant resources within the system and those offenders often return to the system again and again. Specialty Courts support a way out of this cycle by providing high-risk offenders stern intervention, intensive supervision, focused treatment, and rehabilitation.”).

97. *Texas Department of Criminal Justice*, *supra* note 88.

98. *Specialty Court Programs*, *supra* note 96.

99. *See id.* (listing the various Specialty Court programs).

100. Mental health specialty courts and drug specialty courts operate in a similar manner:



- (1) the integration of mental illness treatment services and mental retardation services in the processing of cases in the judicial system;
- (2) the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;
- (3) early identification and prompt placement of eligible participants in the program;
- (4) access to mental illness treatment services and mental retardation services;
- (5) ongoing judicial interaction with program participants;
- (6) diversion of potentially mentally ill or mentally retarded defendants to needed services as an alternative to subjecting those defendants to the criminal justice system;
- (7) monitoring and evaluation of program goals and effectiveness;
- (8) continuing interdisciplinary education to promote effective program planning, implementation, and operations; and
- (9) development of partnerships with public agencies and community organizations, including local mental retardation authorities.<sup>101</sup>

Of these characteristics, the most common components of mental health specialty courts include risk assessments, clinical psychosocial evaluations, frequent appearances before a mental health court judge, treatment by mental health care professionals, substance use treatment, and random alcohol and drug testing.<sup>102</sup>

While specialty courts operate to be advantageous for both offenders and the criminal justice system, the program also has its unique

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Mental health courts were developed across the country as an alternative to the standard adjudication process for people with mental illness who have committed low-level offenses. Like drug courts, mental health courts use non-adversarial, judicially-supervised treatment plans to reduce recidivism that is fueled by untreated mental illness and substance use conditions. The two types of courts differ, however, because drug courts are more likely than mental health courts to use a formalized set of treatment steps and to employ punitive sanctions for treatment noncompliance.

*Texas Department of Criminal Justice, supra* note 88.

101. TEX. GOV'T CODE ANN. § 125.001.

102. See *Texas Department of Criminal Justice, supra* note 88 (listing components of the Harris County implemented felony mental health court program).

disadvantages.<sup>103</sup> First, the general court system can potentially lose funding and resources when special offenders and cases are funneled into the special court program.<sup>104</sup> Specialized courts include the danger that defendants will be separated into hierarchical categories based on their participation in the courts, “or even into ‘good’ and ‘bad’ defendants.”<sup>105</sup> Similar to diversion programs, specialty courts are only as successful as they are available, given funding and access for offenders.<sup>106</sup> Additionally, racial and ethnic disparities are shown to affect an offender’s ability to access specialty courts.<sup>107</sup> These unique disadvantages of specialized courts tend to fail mentally ill offenders in their inability to achieve the ultimate goal of rehabilitation.<sup>108</sup>

#### D. *Insanity as a Defense*

Contrary to popular belief, the use of the insanity defense is sporadic in courts across the country, especially those in Texas. The Code of Federal Regulations defines an “insane person” as an individual that “exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior.”<sup>109</sup> In the setting of a criminal trial, the United States Code permits the affirmative defense of insanity.<sup>110</sup> Where an insanity defense is presented, the burden of proof is on the defendant to show by clear and convincing evidence that, “at the time of the commission of the acts constituting the offense, the defendant, as a result of his or her severe mental disease or defect, was unable to appreciate the nature and quality or the

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103. See Chris Burke, *Advantages & Disadvantages of Specialized Courts*, LEGAL BEAGLE (June 20, 2017), <https://legalbeagle.com/8398649-advantages-disadvantages-specialized-courts.html> [http://perma.cc/Z6DK-8XDN] (“Specialized courts bring many advantages for both the courts and for individual participants, but they also have unique disadvantages.”).

104. *Id.*

105. For example, if a veteran with PTSD is referred to a specialized veterans court, the court will offer the veteran special benefits and resources that a nonveteran with PTSD would not have access to simply because their PTSD did not stem from war. Burke, *supra* note 103.

106. See *Texas Department of Criminal Justice*, *supra* note 88 (describing specialty courts and Texas statistics).

107. *Id.*

108. See Burke, *supra* note 103 (same); *Texas Department of Criminal Justice*, *supra* note 88 (“As of July 2016, centralized data on the number of individuals served in all specialty courts (not only those funded through CJD grants) and their overall outcomes did not exist.”).

109. 38 C.F.R. § 3.354(a) (2018). An insane person is also identified as one “who interferes with the peace of society; or who has so departed . . . from the accepted standards of the community” to an extent that he lacks the ability to adjust “to the social customs of the community in which he resides.” *Id.*

110. 18 U.S.C. § 17 (2018).

wrongfulness of his [or her] acts.”<sup>111</sup> In other words, the defendant did not know the difference between right and wrong. The Texas Code of Criminal Procedure requires a defendant planning to raise insanity as an affirmative defense to file an intention to raise the defense with the court.<sup>112</sup>

Once a notice of intention to raise insanity as an affirmative defense is filed, the court may, *sua sponte* or by motion of the defendant or attorney representing the state, “appoint one or more disinterested experts to examine the defendant with regard to the insanity defense.”<sup>113</sup> The expert may then be appointed to “testify as to the issue of insanity at any trial or hearing involving that issue.”<sup>114</sup> After the examination of a defendant is complete, the examining expert submits a written report to the court, which must include a list of the procedures used and “the examiner’s observations and findings pertaining to the insanity defense.”<sup>115</sup> The case is then submitted to trial.

In a criminal case tried before a jury, the issue of the defendant’s sanity is to be submitted to the jury; however, the issue must be supported by competent evidence before the jury may even hear the issue.<sup>116</sup> Once submitted to the jury, there are three potential jury verdicts: guilty, not guilty, or not guilty by reason of insanity.<sup>117</sup> In a non-jury trial—where a judge, and not a jury, is determining guilt or innocence—the judge determines the issue of the defendant’s sanity.<sup>118</sup>

The insanity defense has been deemed a “losing proposition” and, as a result, is only used in “less than [one] percent of [Texas] criminal cases.”<sup>119</sup> This is presumptively because Texas is considered to have one of the most unattainable standards for a successful insanity

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111. *Id.*

112. TEX. CODE CRIM. PROC. ANN. art. 46C.051.

113. *See id.* art. 46C.101 (allowing the appointment of experts in an insanity defense).

114. *Id.* The court may order a defendant to submit to a mental health examination. *See id.* art. 46C.104 (“If the defendant fails or refuses to submit to examination, the court may order the defendant to custody for examination for a reasonable period not to exceed 21 days.”).

115. *Id.* art. 46C.105. The examiner must then submit a separate report stating, “whether the defendant is presently a person with a mental illness and requires court-ordered mental health services . . . or whether the defendant is presently a person with mental retardation.” *Id.*

116. *Id.* art. 46C.151.

117. *Id.*

118. *Id.* art. 46C.152.

119. Paul Burka, *It’s Crazy: Andrea Yates and the Insanity of the Insanity Defense*, TEX. MONTHLY (July 2002), <https://www.texasmonthly.com/articles/its-crazy/> [http://perma.cc/C6NP-75ZL].

defense.<sup>120</sup> Legal sanity is not the same as medical sanity, so while an offender may clearly be medically insane, the offender may still be considered “sane” under Texas law.<sup>121</sup> The problem lies in the way the justice system identifies the “insane.” Dr. Lucy Puryear, a Houston psychiatrist, calls the wrongfulness standard of the insanity defense bizarre: “To define insanity so narrowly—did [the offender] know [their] conduct was wrong—overlooks the larger issue of, What do you mean by ‘knowing?’”<sup>122</sup> The laws of insanity appear to have been envisioned in a limited scope, yet the population affected is much larger than the Texas legislature could have possibly anticipated.<sup>123</sup> Texas insanity law must be revised to eliminate the determinative “right-wrong test” and instead give appropriate consideration to severe mental illness that creates substantial nuance and exception to a person’s “knowledge” of right and wrong.<sup>124</sup>

### 1. Not Guilty by Reason of Insanity

The Texas Code of Criminal Procedure establishes general provisions relating to the determination of sanity.<sup>125</sup> Where a defendant is found not guilty by reason of insanity, “[t]he parties may . . . agree to . . . dismissal of the indictment or information[, which is used in a criminal misdemeanor,] on the ground that the defendant was insane[] and ent[er] a judgment of dismissal due to the defendant’s insanity.”<sup>126</sup> In the state of Texas, a finding

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120. The success rate in Texas is less than twenty-five percent, which in itself is misleading because “most successful [insanity] pleas involve lesser crimes, and the state does not contest the defense in those cases.” *Id.*

121. See Michael Hall, *Is Andre Thomas Too Crazy to be Executed?*, TEX. MONTHLY (June 4, 2018), <https://www.texasmonthly.com/news/texas-murderer-andre-thomas-is-mentally-ill-but-is-he-insane/> [http://perma.cc/7W8R-CXUA] (“Texas courts, including the Court of Criminal Appeals, generally have found that most mentally ill defendants knew what they were doing.”).

122. Burka, *supra* note 119.

123. See TEX. PENAL CODE ANN. § 8.01(a) (“[A]t the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.”); Hall, *supra* note 121 (“Texas courts, including the Court of Criminal Appeals, generally have found that most mentally ill defendants knew what they were doing.”); Burka, *supra* note 119 (“Change the law so that the right-wrong test is not the ultimate determinant of sanity in all cases.”).

124. Burka, *supra* note 119.

125. See TEX. CODE CRIM. PROC. ANN. art. 46C.153 (determining “a defendant is not guilty by reason of insanity”). The code provides that a defendant shall be found “not guilty by reason of insanity if: (1) the prosecution has established beyond a reasonable doubt that the alleged conduct constituting the offense was committed; and (2) the defense has established by a preponderance of the evidence that the defendant was insane at the time of the alleged conduct.” *Id.* art. 46C.153(a).

126. *Id.* art. 46C.153(b).

of not guilty by reason of insanity is considered an acquittal.<sup>127</sup> However, an acquittal is not the end of the judicial process for a legally insane defendant.<sup>128</sup> The court must then make a determination as to the dangerousness of the conduct of the acquitted person, and the acquitted person remains in the jurisdiction of the court if the court finds such danger, “the court retains jurisdiction over the acquitted person[.]”<sup>129</sup> In its retention of jurisdiction, the court must order the commitment of the acquitted person “to the maximum security unit of any facility designated by the department.”<sup>130</sup> At the end of the thirty-day maximum involuntary hold, the court must conduct a hearing on disposition, which shall be managed in the “same manner as a hearing on an application for involuntary commitment[.]”<sup>131</sup> There are a number of outcomes the court may reach

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127. “[A] defendant who is found not guilty by reason of insanity stands acquitted of the offense charged and may not be considered a person charged with an offense.” *Id.* art. 46C.155(a).

128. When a defendant is:

found not guilty by reason of insanity, the court immediately shall determine whether the offense of which the person was acquitted involved conduct that: (1) caused serious bodily injury to another person; (2) placed another person in imminent danger of serious bodily injury; or (3) consisted of a threat of serious bodily injury to another person through the use of a deadly weapon.

*Id.* art. 46C.157.

129. If the court determines the offense:

involved conduct that caused serious bodily injury . . . , placed another person in imminent danger . . . , or consisted of a threat of serious bodily injury . . . through the use of a deadly weapon, the court retains jurisdiction over the acquitted person until either: (1) the court discharges the person and terminates its jurisdiction . . . ; or (2) the cumulative total period of institutionalization and outpatient or community-based treatment and supervision . . . equals the maximum term provided by law [in which case] the court’s jurisdiction is automatically terminated.

*Id.* art. 46C.158.

130. *See id.* art. 46C.251(a) (“The court shall order the acquitted person to be committed for evaluation of the person’s present mental condition and for treatment to the facility designated by the commission. The period of commitment under this article may not exceed 30 days.”). For example, the court may commit a legally insane individual to the North Texas State Hospital, where the goal is to treat their mental illness so they can safely return to the community. *See State Hospitals, supra* note 23 (describing the state hospital admission process).

131. TEX. CODE CRIM. PROC. ANN. art. 46C.253(a). At the hearing on disposition, the court should address three things:

(1) whether the person acquitted by reason of insanity has a severe mental illness or mental retardation; (2) whether as a result of any mental illness or mental retardation the person is likely to cause serious harm to another; and (3) whether appropriate treatment and supervision for any

after the hearing on disposition, of which the court may order: commitment “for inpatient treatment or residential care . . . , outpatient or community-based treatment . . . , or discharge[] and immediate[] release[.]”<sup>132</sup> These laws are in place to enhance the objective that, if a defendant simply does not have the requisite culpability to commit a crime because of insanity, the defendant should not be deemed “guilty” and subsequently subjected to traditional criminal justice methods.<sup>133</sup>

Although it may statutorily appear otherwise, the insanity defense is not always operational—even in cases where the great weight of the evidence supports its finding.<sup>134</sup> In 2001, Lorenzo Reyna walked several miles from his mother’s home in Clint, Texas, and began to shoot at cars on the highway as they drove by.<sup>135</sup> Dr. Marvasti, Reyna’s jail psychiatrist, testified that “at the time of the shooting, [Reyna] was insane and could not appreciate the wrongfulness of his acts.”<sup>136</sup> At the time of the shooting—according to Dr. Marvasti, to a degree of “reasonable medical certainty”—Reyna was suffering from a psychosis involving hearing voices and seeing things.<sup>137</sup> Accordingly, Reyna could not have had the requisite awareness that what he was doing was wrong—the touchstone determination in any insanity defense.<sup>138</sup> Despite benchmark evidence in favor of the insanity defense, the jury found Reyna guilty, assessing punishment at ten and five years’ confinement for both counts.<sup>139</sup> This finding begs the question: [W]hat

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mental illness or mental retardation rendering the person dangerous to another can be safely and effectively provided as outpatient or community-based treatment and supervision.

*Id.* art. 46C.253(b).

132. *Id.*

133. See Arnold H. Loewy, *The Two Faces of Insanity*, 42 TEX. TECH L. REV. 513, 513 (2009) (discussing the purposes of the insanity defense). An offense has not been committed unless the offender “intentionally, knowingly, recklessly, or with criminal negligence engages in conduct” defined by the offense statute. See TEX. PENAL CODE ANN. § 6.02(a) (requiring a culpable mental state).

134. See *Reyna v. State*, 116 S.W.3d 362, 366–69 (Tex. App.—El Paso 2003, no pet.) (reversing the lower court’s refusal to accept the insanity defense “conclude[ing] the judgment in this case was overwhelmingly against the great weight and preponderance of the evidence . . .”).

135. Reyna was arrested and charged with aggravated assault and deadly conduct, and a jury found him guilty on both counts. *Id.* at 364.

136. *Id.* at 365. Reyna was forced to undergo “a number of competency and sanity examinations” due to delusions he experienced about the Mexican Mafia and Jesus shortly after his arrest. *Id.* at 365.

137. *Id.* at 365–66.

138. *Id.* at 366; see TEX. PENAL CODE ANN. § 8.01(a) (“It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.”).

139. *Reyna*, 116 S.W.3d at 366.

purpose does legislation serve if statutory intervention nevertheless fails mentally ill defendants?<sup>140</sup>

## 2. Offenders with Post-Traumatic Stress Disorder

One mental health illness that poses similar challenges for criminal defendants is Post-Traumatic Stress Disorder. “Post-Traumatic Stress Disorder [(PTSD)] is a psychiatric disorder that can occur following . . . life-threatening events such as military combat, natural disasters, terrorist incidents, serious accidents, or physical or sexual assault.”<sup>141</sup> It is estimated that “7.8[%] of Americans will experience [the effects of] PTSD at some point in their lives,” and roughly “3.6[%] of U.S. adults aged 18 to 54 (5.2 million people) have PTSD during the course of a given year.”<sup>142</sup>

In *Travis v. State*,<sup>143</sup> Defendant Travis pled guilty to burglary with intent to commit aggravated assault with a deadly weapon.<sup>144</sup> Evidence was presented at trial that Travis was diagnosed with “[PTSD] and related polysubstance use disorder . . . [on] account of his military service in Iraq.”<sup>145</sup> During the punishment phase, the jury recommended fifty-five years’ imprisonment, which was ultimately imposed.<sup>146</sup> Travis appealed, alleging error in the jury selection process.<sup>147</sup> “Venire Member No. 3” was struck for cause after he identified himself as a military veteran and stated that he served as a veterans’ service officer, claiming to have been very familiar with veterans who suffer from PTSD.<sup>148</sup> In fact, this potential juror emphasized the importance of PTSD patients receiving proper

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140. The Court of Appeals in El Paso rectified the jury’s verdict, finding the record “replete with evidence that Reyna did not understand the wrongfulness of his actions at the time he shot at anonymous motorists on an interstate highway,” and reversing the trial court’s judgment. *Id.* at 367.

141. *Our Mission*, PTSD FOUND. AMERICA., <http://ptsdusa.org> [<http://perma.cc/KA96-69PU>]. There are three types of symptoms which are prevalent in patients with PTSD. *See id.* (describing the symptoms of PTSD). The first, “involves reliving the trauma in some way . . . such as confront[ing] a traumatic reminder” or being unable to concentrate while “trying to do something else.” *Id.* The second symptom consists of “either staying away from places or people that remind [the patient] of the trauma, isolating from other people, or simply feeling numb.” *Id.* The third, includes constantly “feeling on guard, irritable, or startling easily.” *Id.*

142. *Id.*

143. *Travis v. State*, No. 04–14–00560–CR, 2015 WL 6876830 (Tex. App.—San Antonio Nov. 10, 2015, pet. re’f’d) (mem. op., not designated for publication).

144. *Id.* at \*1.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

treatment, and he even warned of the dangers that follow inadequate treatment, such as substance abuse.<sup>149</sup> During voir dire, “the prosecutor asked, If you have a situation where you were presented with evidence of PTSD, could you ever entertain a sentence of 99 years?”<sup>150</sup> Venire Member No. 3 responded that he could not, adding “that if PTSD is a factor,” a treatment option should be available, “even if punishment is required.”<sup>151</sup>

The State challenged Venire Member No. 3 for cause, claiming he would not be able to refrain from injecting his personal knowledge into the equation.<sup>152</sup> The trial court dismissed Venire Member No. 3, and as a result, the jury panel did not include the veteran familiar with PTSD.<sup>153</sup> The Court of Appeals in San Antonio upheld the trial court’s decision to dismiss the veteran as a potential juror.<sup>154</sup> Upon doing so, the Texas Appellate Court arguably conveyed the message that the system is more concerned with possible bias from *one potential juror* than it is with the mental health needs of its offenders with PTSD.<sup>155</sup>

#### a. PTSD Foundation of America

The PTSD Foundation of America is a non-profit organization that solely focuses on providing support for our veterans by addressing the “unseen wounds of war.”<sup>156</sup> In order to combat Post-Traumatic Stress, the PTSD Foundation of America implements a strategy to fulfill its mission of preparing veterans to reacclimate to the U.S. community and provide for their mental health needs.<sup>157</sup> The foundation commits its efforts to

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149. *Id.*

150. *Id.* at \*2.

151. *Id.*

152. *Id.* The State based this argument on the Texas Code of Criminal Procedure, which “require[s] a juror to refrain from discussing his own personal knowledge or experiences with other jurors during deliberations.” *Id.* at \*3; see TEX. CODE CRIM. PROC. ANN. art. 36.13 (stating the jury “is bound to receive the law from the court and be governed thereby.”).

153. See *Travis*, 2015 WL 6876830, at \*2 (affirming the dismissal of a potential juror on the basis of his beliefs on convicting a defendant with PTSD).

154. *Id.* at \*4. Where a potential juror responds with vacillating answers, deference is granted to the trial court’s ruling on the challenge for cause. See *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010) (“We review a trial court’s ruling on a challenge for cause with considerable deference because the trial judge is in the best position to evaluate a venire member’s demeanor and responses.”).

155. See TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9) (providing bias or prejudice as a reason to challenge for cause); *Travis*, 2015 WL 6876830, at \*3 (allowing the trial court’s decision to dismiss the potential juror based on fear of bias).

156. See *Our Mission*, *supra* note 141 (“[P]roviding hope and healing for the unseen wounds of war.”).

157. The PTSD Foundation of America plans to fulfill its mission to:



mentoring combat veterans and their families in their interaction and experience with post-traumatic stress.<sup>158</sup> This foundation recognizes the mental health needs of veterans and fights for the rights and quality of life of those suffering from mental illness—something Texas courts need to take note of.<sup>159</sup>

b. Camp Hope

Camp Hope is an out-patient, community-based treatment program that focuses on the care of veterans with PTSD.<sup>160</sup> Camp Hope opened in 2012 “in a quiet and safe setting in Houston, Texas” and stands on a platform of helping veterans and their families “find healing, help and hope” through an “intensive peer support and mentoring program for Post-Traumatic Stress.”<sup>161</sup> Additionally, Camp Hope offers:

[A] 90+ day PTSD recovery program in which residents [can] attend group lessons and support sessions . . . ; conduct individual mentoring sessions . . . ; participate in off-site small group interaction activities (fishing, hiking, local activities and events) . . . ; and get involved with local churches, businesses, and volunteer organizations.<sup>162</sup>

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1. Bring healing to our military community (Active duty, Reserves and National Guard, veterans, and their families) through pastoral counseling, and peer mentoring, both on an individual basis, and in group settings.
  2. Raise awareness of the increasing needs of the military community through public events, media outlets, social media, service organizations, and churches.
  3. Networking government agencies, service organizations, churches and private sector businesses into a united “Corps of Compassion,” to bring their combined resources together to meet the needs of the military community on a personal and individual/family level.

*Id.*

158. While many troops and military service members come home with “visible wounds,” many more return with unseen wounds and scars not visible to the eye. The PTSD Foundation of America takes on the “duty as Americans to help these mighty warriors and their families adjust and find their new normal.” *Id.*

159. *See id.* (discussing the foundation’s duty to help those in need).

160. Camp Hope strives to “give back to those who have given of themselves so selflessly,” namely, veterans and troops suffering from PTSD. *See id.* (“Providing hope and healing for the unseen wounds of war.”).

161. *Camp Hope: Interim Housing for Veterans*, PTSD FOUND. AMERICA., <http://ptsdusa.org/camp-hope/> [http://perma.cc/Y5QJ-4PJN].

162. *Id.*

The Camp Hope staff is trained and specialized in all things related to PTSD.<sup>163</sup>

While Camp Hope embraces the nation's troops, veterans, and their families, it is limited in its capacity and ability to help those in need of mental health help.<sup>164</sup> Such a lack of capacity begs the question: should the government be doing more for its veterans of war? One of the most selfless things a person can do for their government, country, and neighbor is to put their life on the line for the freedoms and liberties of others. The lack of support for those people when they come back from war—damaged and broken—is not only unacceptable, it is downright inhumane.<sup>165</sup>

#### E. *The Reality of Mental Health and Criminal Justice*

While there may be policies in place, the reality of mental health and its interaction with the criminal justice system is not exactly operational.<sup>166</sup> Law enforcement officers are typically the first to interact with mentally ill offenders, and many of these officers find the mental health system ineffectual to work with.<sup>167</sup> When an officer comes into contact with a mentally impaired individual, their training requires them to contact a Texas Mental Health and Mental Retardation (MHMR) representative, who will

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163. The Camp Hope staff consists of:

a unique team of combat veterans and civilian pastoral staff trained in working with victims of trauma and post-traumatic stress. They understand that those who have served this nation continue to struggle with the invisible wounds of combat and are working to assist our troops in putting the pieces of their lives back together. The Camp Hope staff uses the necessary traditional counseling tools and incorporates a faith based approach to help combat the effects of Post Traumatic Stress. In addition, the staff assists veterans with a myriad of issues including job placement, coordination with the Department of Veteran's Affairs and reputable veteran service organizations to assist with claims and benefits, transportation to appointments and peer support groups integration.

*Id.*

164. Rooms for residents at Camp Hope are limited and are "based on first come first serve and need." *Id.* Camp Hope is not a government-funded agency—the PTSD Foundation of America is funded solely off of the generosity of sponsors and donations. Camp Hope operates primarily with volunteers that donate their time to make a difference in the lives of veterans and their families. *See id.* (detailing Camp Hope and its mission to help veterans with PTSD).

165. *See Our Mission*, *supra* note 141 ("[The] brave men and women in uniform understand duty, honor, and sacrifice. Many have returned home with both the visible scars, and the unseen wounds of war.").

166. *See O'Neill*, *supra* note 7 ("[The] traditional model of crime and punishment has been poorly equipped to handle defendants with mental health issues.").

167. E-mail from Troy Collum II, Former Texas Law Enforcement Officer, to author (Dec. 26, 2018) (on file with author).

then take certain steps to determine if the individual is having a mental crisis.<sup>168</sup> In officers' experience, MHMR representatives are very difficult to work with, and many times officers are left with a feeling of discomfort with the representative's conclusions about the individual's mental health.<sup>169</sup> It is unnerving that law enforcement must sometimes "force the hand" of MHMR in order to get people the mental health assistance they need.<sup>170</sup> As gatekeepers for mental crisis help, MHMR representatives—who portray themselves as "provider[s] of quality mental health"<sup>171</sup>—should be held to a higher standard.

Before becoming a certified law enforcement officer, police academies require all officers to have mental health training. This training provides officers with basic-level training on how to recognize and respond to individuals experiencing a mental crisis.<sup>172</sup> Law enforcement officers typically do not have any specialized education or experience in medicine or psychology, which could potentially be beneficial for both law enforcement personnel and the individuals they come into contact with.<sup>173</sup> Requiring specialized education or training would result in more patience and empathy, thereby creating a better outcome for both the officer and the individual.<sup>174</sup>

#### IV. MENTAL HEALTH REFORM

Based on its potentially devastating effects on Texas communities, there is a dire need for societal and legal adjustments in the mental health realm, especially as it interacts with criminal justice systems.<sup>175</sup> Over the last few

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168. *See id.* (describing the interaction between law enforcement and MHMR).

169. Troy Collum II, a law enforcement officer with 17 years of experience, has described having to "really push" MHMR representatives to help people in mental crisis, especially those threatening suicide. *Id.*

170. *See id.* ("I literally had to force the hand of the MHMR rep. by letting them know I would be disclosing the situation in great detail in my report to include their name should someone injure themselves or others.").

171. *About Us*, MHMR TARRANT, <http://www.mhmrtc.org/About-Us/About-Us> [<http://perma.cc/25LE-HT4B>].

172. E-mail from Troy Collum II, *supra* note 167.

173. Before becoming a police officer, Troy Collum II had a career in nursing. As an officer, Collum credits his nursing career for putting him "way ahead of the curve in dealing with people in crisis and how to recognize someone in a mental health episode and someone who was not," which gave him more patience and sense of empathy. *Id.*

174. *See id.* (discussing the effects of a nursing background for law enforcement).

175. The "lack of information sharing" between the health and criminal justice systems may be a contributing factor to this issue.

decades, the number of psychiatric hospital beds “plummeted almost [ninety-seven] percent,” and with no available alternative, the mentally ill often end up in jails and prisons where there is a lack of adequate resources to meet the mental health care needs of these individuals.<sup>176</sup> Our mental health system is completely “broken;” in 2014, “ten times the number of people with serious mental illness were in prisons and jails as in state mental hospitals.”<sup>177</sup> President Trump has even acknowledged the primary issue with mental health care, saying, after the Parkland, Florida school shooting, “You know, years ago, we had mental hospitals . . . a lot of them, and a lot of them have closed[.]”<sup>178</sup> With nowhere else to turn, the criminal justice system has become a primary provider for mental health treatment.<sup>179</sup> Perhaps the most pressing—and obvious—solution to the gap between mental health care and the criminal justice system is to reverse the effects of deinstitutionalization by making more psychiatric hospital beds available.<sup>180</sup> Texas lawmakers need to bridge the gap between criminal justice and mental health to promote a much-needed balance between punishment and healing.<sup>181</sup>

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There is a need to establish integrated data systems to maximize good outcomes and prevent people from falling through “gaps” in the system. Examples of gaps include people being incarcerated without knowledge of the person’s mental health history and treatment plan, people being released from incarceration into the community without any effort to coordinate with the mental health system to ensure follow up services, etc.

Docherty, *supra* note 4.

176. See John Snook & E. Fuller Torrey, *America Badly Needs More Psychiatric-Treatment Beds*, NAT’L REV. (Feb. 23, 2018, 5:00 PM), <https://www.nationalreview.com/2018/02/america-badly-needs-more-psychiatric-treatment-beds/> [http://perma.cc/LR6Z-NV5R] (“Without treatment beds, the criminal-justice system has become our de facto mental-health system.”); see also HUMAN RIGHTS WATCH, *supra* note 28, at 1 (2003) (explaining why prisons are not an adequate placement for the mentally ill); Raphaelson, *supra* note 5 (describing the mental health crisis due to a severe shortage of inpatient care).

177. Snook & Torrey, *supra* note 176.

178. *Id.* The President went on to say, “We’re going to be talking seriously about opening mental health institutions again.” Cathy Cassata, *Is President Trump Right? Should We Open More Mental Institutions?*, HEALTHLINE (Mar. 6, 2018), <https://www.healthline.com/health-news/president-trump-should-we-open-more-mental-institutions#1> [http://perma.cc/GW7W-RH4Q].

179. Docherty, *supra* note 4. (“In 44 out of 50 states, prisons and jails hold more individuals with serious mental illness than the largest state hospital.”).

180. With the availability of treatment, mentally ill individuals could possibly avoid the criminal justice system altogether by never even becoming offenders. Snook & Torrey, *supra* note 176.

181. See Shane Levesque, *Closing the Door: Mental Illness, the Criminal Justice System, and the Need for a Uniform Mental Health Policy*, 34 NOVA L. REV. 711, 728 (2010) (addressing “the revolving door problem faced by the mentally ill . . . entangled in the criminal justice system”); Snook & Torrey, *supra*

A. *Recidivism Rates of Mentally Ill Offenders*

For most offenders, regardless of any mental illness, the first six months after release from prison are those with the highest risk of recidivism.<sup>182</sup> Individuals released from prison are tasked with finding housing and employment, reaching out to old friends and family, and reacclimating to life and society outside of prison.<sup>183</sup> For mentally ill offenders, this critical readjustment period is especially challenging when they have not received any preparation or continued mental health treatment.<sup>184</sup> According to the Bureau of Justice Statistics, nearly one in four incarcerated offenders that have a mental health problem have “served [three] or more incarcerations[;]” compared to the one in five offenders without a mental health problem.<sup>185</sup> A 2005 Department of Justice study revealed that 75% of “incarcerated individuals with a [medical] diagnosis had [already] been arrested before.”<sup>186</sup> Further, 81.2% of mentally ill offenders in state prisons have a prior criminal history.<sup>187</sup>

A 2017 Department of Justice study provided that diagnosed offenders “have a 9% greater chance of [recidivism] one year after release,” and an increased 15% chance after five years.<sup>188</sup> This recidivism risk could be attributed to the fact that incarceration itself can worsen mental health.

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note 176 (“In the aftermath of another tragic mass shooting, expanding access to inpatient care for the mentally ill must be a top priority.”); O’Neill, *supra* note 7 (joining the Supreme Court of Texas and the Court of Criminal Appeals for the first time to discuss mental health).

182. HUMAN RIGHTS WATCH, *supra* note 28, at 193. Recidivism refers to “a tendency to relapse into a previous condition or mode of behavior, especially pertaining to criminal behavior.” *Recidivism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/recidivism> [http://perma.cc/29JQ-TGMD].

183. See HUMAN RIGHTS WATCH, *supra* note 28 (describing the challenges of newly discharged offenders); Levesque, *supra* note 181, at 728 (“[M]any states do nothing in the way of providing discharge planning services to assist mentally ill offenders with reintegration into society, despite significant evidence showing that doing so reduces the risk of recidivism.”).

184. See HUMAN RIGHTS WATCH, *supra* note 28, at 193 (“Absent appropriate mental health treatment (as well as supports for housing, employment and income), the mentally ill who commit criminal offenses are likely to repeat them, cycling in and out of correctional facilities for years.”).

185. See Levesque, *supra* note 181, at 726 (citing statistics from 2004 that suggest nearly half of all mentally ill offenders had multiple periods of incarceration or probation); Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, BUREAU JUST. STAT. (Sept. 2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf> [http://perma.cc/Z2WT-XX6N] (providing statistics of mental health problems in correctional facilities).

186. Jo Sahlin, *The Prison Problem: Recidivism Rates and Mental Health*, GOOD THERAPY (May 20, 2018), <https://www.goodtherapy.org/blog/prison-problem-recidivism-rates-mental-health-0520187> [http://perma.cc/F97E-EK9H].

187. HUMAN RIGHTS WATCH, *supra* note 28, at 193.

188. Sahlin, *supra* note 186.

Strict rules and isolation while incarcerated can potentially “exacerbate stress,” which may lead to the development of “additional mental health concerns as [individuals] adjust to the transition.”<sup>189</sup> Such “compromised mental health” often leads to substance abuse, which “spread[s] through populations of offenders” like wildfire.<sup>190</sup> An astonishing number of offenders with a mental illness turn to self-medicating with illegal narcotics or alcohol.<sup>191</sup> Self-medication becomes a dark and endless cycle for mentally ill offenders.<sup>192</sup>

The population of incarcerated offenders with mental health needs “has reached “crisis proportions,’ . . . [and with] more people [being] rearrested, the population . . . stays high.”<sup>193</sup> Even where mentally ill offenders can receive psychiatric treatment during incarceration, the stability resulting from treatment is dependent on the continuation of those treatment plans, which all too often are terminated upon release.<sup>194</sup> Reduced mental health makes it very difficult to transition upon release, inevitably reducing an offender’s ability to “survive within the law” outside of jail.<sup>195</sup> As a result, the offenders inevitably reoffend.<sup>196</sup> Recidivism inexorably implodes the foundation upon which the Texas Department of Criminal Justice has built its purpose: to “promote positive change in offender behavior [and]

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189. *Id.*

190. *See id.* (“[A]lcohol and drug addiction can spread through populations of offenders. The sale, trade, and consumption of drugs can broaden one’s criminal network.”).

191. *See* Chronological Record of Contacts, State of Texas v. Tyre, No. 1397289 (2015) (recording the contacts with a bipolar offender that ultimately led to his probation revocation). *See also* Telephone Interview with Kathryn Owens, Assistant District Attorney, Tarrant County Criminal District Attorney (Sept. 13, 2018) (discussing recent cases and how mentally ill offenders use self-medication when the system fails). Ninety percent “of the mentally ill offender population has a diagnosable substance abuse/dependence disorder” that must be treated. *Mental Health Program and Services*, *supra* note 43, at 7.

192. Offenders that are convicted of a DUI/DWI or possession of a controlled substance are ineligible for a medical mental health diagnosis. Without a diagnosis, mentally ill offenders are unable to obtain medical treatment. Without treatment, mentally ill offenders systematically fall into self-medicating with illegal narcotics or alcohol. This method of self-medication inevitably leads to further conviction and prison time. *See* Telephone Interview with Kathryn Owens, *supra* note 191 (identifying mental health issues within the criminal justice system).

193. Sahlin, *supra* note 186.

194. *See* Levesque, *supra* note 181, at 713 (noting that because many offenders are unable to afford mental health care, their release often creates a “revolving door”).

195. Sahlin, *supra* note 186.

196. Levesque, *supra* note 181, at 714; Sahlin, *supra* note 186.

reintegrate offenders into society.”<sup>197</sup>

#### B. *Texas Courts on Reform*

For the first time in history, Texas courts are working together to focus their attention on the role of the judicial branch in ensuring a just legal framework and system for “people with mental health needs.”<sup>198</sup> The National Center for State Courts called for a cultural adjustment in the court systems, and Texas judges, based on their response, appeared to agree. Through a collaborative effort, the Texas Court of Criminal Appeals and the Supreme Court of Texas created the first Judicial Commission on Mental Health in 2018.<sup>199</sup> The Judicial Commission on Mental Health will hopefully change the face of mental health in the criminal justice system permanently through cooperation and individualized policy decisions.

The Judicial Commission on Mental Health will spearhead improvements in the quality, effectiveness, and timeliness of decisions affecting those with mental illness in the justice system. The Commission will broaden collaboration to promote better policy development, judicial education, data sharing and performance measurement. The Commission will also focus attention on specialized needs where one size does not fit all, as in our rural communities or among populations that are generalized due to a lack of resources.<sup>200</sup>

Texas judges express confidence that the Commission will serve as an “invaluable resource for the Texas Legislature as it develops policy solutions” and press forward in its effort to create a better justice system for everyone.<sup>201</sup>

The Honorable Harriet O’Neill, who served two terms on the Supreme Court of Texas, appeared before the judges at the joint hearing in January as a board member of the Meadows Mental Health Policy Institute and

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197. *Texas Department of Criminal Justice*, HOGG FOUND. FOR MENTAL HEALTH, <http://hogg.utexas.edu/public-behavioral-health-services-in-texas/texas-department-of-criminal-justice-and-local-criminal-justice-agencies> [<http://perma.cc/G9NX-ADXN>].

198. O’Neill, *supra* note 7.

199. This commission consists of “31 commissioners and dozens of mental health advocates and professionals [working] together” to create a “new problem-solving model for the Texas court system.” *Id.*

200. *Id.*

201. *Id.*

spoke about the need for specially trained jurists.<sup>202</sup> With Martin Luther King, Jr. Day fresh on people's mind, Justice O'Neill shared a vision reflected by millions of Texans all-too familiar with the clash of justice and mental health:

[T]hat no one will be deprived of equal justice before the law because of a mental illness; [Texas] jails [and prisons] will not become proxies for the lack of available [mental health] treatment centers; that individuals in [the] system of justice will be judged neither for the color of their skin nor for the health of their minds; that individuals and families who face mental health challenges will [speak up] without fear of stigma or retribution; and that the judiciary will . . . expand their focus beyond punishment to healing those in need.<sup>203</sup>

With Texas' highest state courts finally on board, it is time to provide the justice system with the cultural shift it so desperately needs.

## V. CONCLUSION

Time and time again, the Texas Criminal Justice system fails to account for situations in which its offenders are mentally ill. Texas needs to embrace the idea that mental health treatment facilities are of vital importance to society because too many mentally ill offenders are sitting in Texas jails and prisons. The Texas Department of Criminal Justice has erroneously become a primary provider for mental health care, yet the penal system is not designed to handle mental health treatment. Texas law is not perpetuated to keep the mentally ill out of the criminal justice system, because even with diversion programs and specialty courts, correctional facilities are becoming increasingly more inhabited by the mentally ill. The insanity defense is too narrow, and its standard is too high, for the thousands of medically insane—but not *legally* insane—offenders that slip through the cracks. Once mentally ill offenders get involved in the criminal justice system, it is often impossible for them to get out; the system becomes a revolving door that does not stop turning because there is no way to seek help.

The availability of mental health treatment facilities needs to drastically expand, which will provide mentally ill offenders with a preferred alternative to the criminal justice system. Until society embraces mental health treatment centers as opposed to incarceration, there will be no justice for

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202. *Id.*

203. *Id.*



anyone involved. Texas courts are finally shedding light on the gap between mental health care and the criminal justice system; now it is time for the legislature to get to work. By failing to accommodate for mentally ill offenders, the system fails in its entirety because the ultimate goal of successful rehabilitation can never be accomplished. No one should be deprived of equal justice because of a mental illness; offenders or not, the mentally ill deserve better. The State of Texas deserves better.